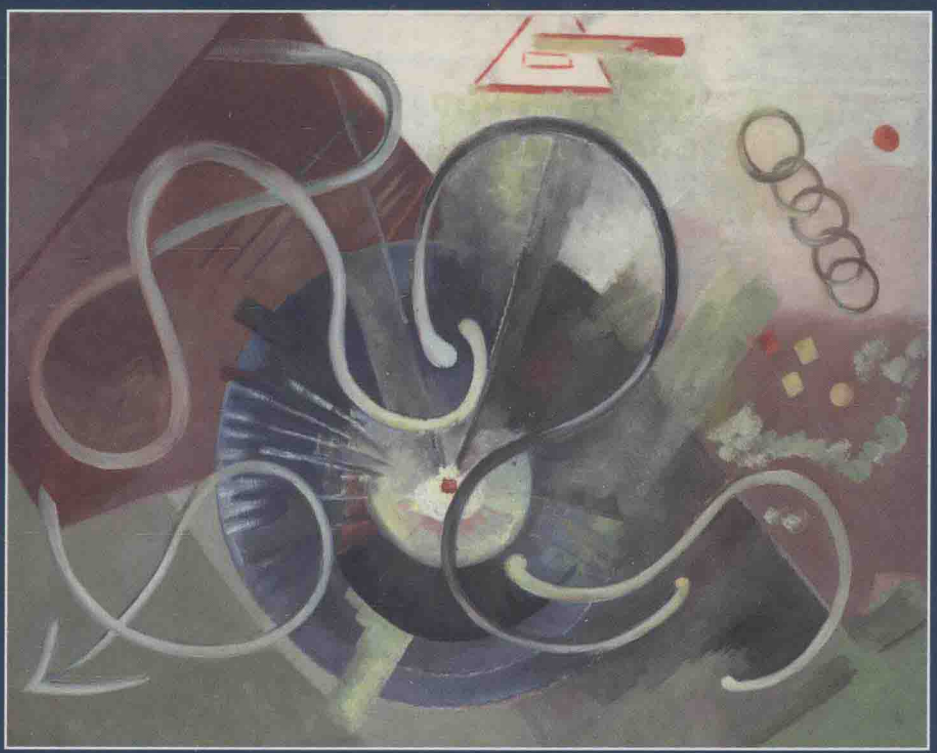
Due Process of LAWMAKING

The United States, South Africa, Germany, and the European Union



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DUE PROCESS OF LAWMAKING

With nuanced perspective and detailed case studies, *Due Process of Lawmaking* explores the law of lawmaking in the United States, South Africa, Germany, and the European Union. This comparative work deals broadly with public policymaking in the legislative and executive branches. It frames the inquiry through three principles of legitimacy: democracy, rights, and competence. Drawing on the insights of positive political economy, the authors explicate the ways courts uphold these principles in the different systems. Judicial review in the American presidential system suggests lessons for the parliamentary systems in Germany and South Africa, while the experience of parliamentary government yields potential insights into the reform of the American law of lawmaking. Taken together, the national experiences shed light on the special case of the European Union. In dialogue with each other, the case studies demonstrate the interplay between constitutional principles and political imperatives under a range of different conditions.

Susan Rose-Ackerman is the Henry R. Luce Professor of Jurisprudence (Law and Political Science) at Yale University. She has published widely on administrative law, corruption, federalism, and law and economics. She is the author of *From Elections to Democracy: Building Accountable Government in Hungary and Poland* (2005) and *Corruption and Government: Causes, Consequences, and Reform* (1999) (translated into seventeen languages; second edition, with Bonnie Palifka, forthcoming). Her current research and teaching interests are the comparative study of administrative law and public policy analysis, with a focus on the United States and Western Europe, and the political economy of corruption and its control. She directs the program in comparative administrative law at Yale Law School.

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James Fowkes obtained a law degree from the University of the Witwatersrand, South Africa, and an LL.M. from Yale Law School as a Fulbright Scholar. He completed his JSD at Yale under the supervision of Bruce Ackerman. Fowkes clerked at the South African Constitutional Court in 2008 and has held research fellowships at the Max Planck Institute for Comparative and International Private Law, Hamburg and the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany. He is currently Senior Researcher at the Institute for International and Comparative Law in Africa at the University of Pretoria, South Africa. He has published articles in the *South African Journal on Human Rights*, the *Constitutional Court Review*, and the *Cambridge Journal of International and Public Law*.

Preface

This project began with a conversation among the three authors at Yale Law School about our joint interest in comparative public law, especially administrative law and the law of lawmaking. Over time it developed into a book manuscript as we shared drafts and discussed new issues. Our book's title is borrowed from the title of a seminal article by Hans Linde that was one inspiration for our project. That article, *Due Process of Lawmaking*, published in 1975, focused on judicial review of the legislative process at the federal and state levels in the United States. We build on his analysis to contrast the legislative with the administrative process and to compare the United States with Germany, South Africa, and the European Union.

One of us, Rose-Ackerman, has been interested in comparative administrative law and public policymaking since 1991–2 when she spent a year in Berlin under Fulbright and Guggenheim fellowships. The result was a book, *Controlling Environmental Policy: The Limits of Public Law in Germany and the United States* (1995), that combines legal and social science analyses to contrast executive branch policymaking processes in the two countries. Ten years later she lived in Budapest and wrote a companion book on executive policymaking in Eastern Europe entitled *From Elections to Democracy: Building Accountable Government in Hungary and Poland* (2005). With this background, she has developed a broader interest in comparative policymaking processes in the executive and in independent agencies, but the legislative process is, for her, a new topic.

Stefanie Egidy's and James Fowkes's comparative law interests were fuelled by their studies at Yale Law School combined with their research in their home countries of Germany and South Africa, respectively. Both have carried out research that complements the present study. Egidy's doctoral research analyzes German and U.S. policy during the financial crisis in 2008/2009. Government responses to that crisis raise fundamental questions

about the constitutional requirements of the legislative process in urgent, multidimensional situations where legislative and executive powers interact. It reflects her deeper interest in the ways procedure can help safeguard constitutional values. Fowkes's doctoral thesis, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (J.S.D., Yale Law School, 2014), draws on both legal and political theory to understand the work done by the South African Constitutional Court since its creation in 1995 as well as the vital, underacknowledged role of the African National Congress government in constructing the country's celebrated constitutionalism.

Our conversations on the law of lawmaking were motivated by two constitutional law cases, one from Germany and one from South Africa, that are striking to an American scholar of public law. In the South African case, *Doctors for Life*, the Constitutional Court struck down two statutes because there was insufficient consultation before passage. In the German case, *Hartz IV*, the Constitutional Court voided part of a statute because the legislature did not articulate the factual basis of key provisions. These decisions contrast with the American case, where legislative procedures and reasons are seldom subject to court review. Of course, as we examined these cases and the legal landscape further, we discovered much nuance and complexity in all three legal regimes, a complexity that is also reflected in the experience of the European Union, a case that we added for contrast and because the German case operates with the European Union as a background.

We began with the goal of writing a law review article, but the project soon developed a logic of its own and grew to book length as we moved beyond our initial interest in judicial review of the legislative process. We saw that we also needed to draw on our interests in administrative law to compare democratic accountability, technical competence, and the protection of rights in both the legislative and the rulemaking processes in the executive and the independent agencies. The result, we hope, will provide insights not only to public lawyers and policymaking in our case study countries, but also to those in other polities seeking ways to enhance the democratic accountability of both the legislature and the executive without sacrificing competence or the protection of rights.

Several people commented on portions of the draft within their areas of expertise. We wish to thank Bruce Ackerman, Tom Ginsburg, Michaela Hailbronner, Jonathan Klaaren, Patrick Luff, Jud Matthews, Joana Mendes, Nicholas Parrillo, Matthias Rossbach, Ewold Sakkers, Johannes Saurer, Kevin Stack, Peter Strauss, and the Cambridge University Press referees for their essential help as the manuscript developed. We are also very grateful

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Contents

Introduction

Laws are like sausages. It is better not to see them being made.[1]

If this republic is remembered in the distant history of law, it is likely to be for its enduring adherence to legitimate institutions and processes, not for its perfection of unique principles of justice and certainly not for the rationality of its laws.

Hans Linde[2]

Our topic is the law of lawmaking – both in the legislature and in the executive. Combining knowledge and insights from the United States, South Africa, Germany, and the European Union, we illustrate the distinctive value of comparative work.[3] We strive for a middle ground between particularism and universalism. By comparing different responses to similar problems, observers in different countries can learn something about the strengths and weaknesses of their own legal systems. We show how fundamental differences in institutional design shape the very nature of due process of lawmaking in both the legislative and the executive branches. Most notably, we stress the way presidential and parliamentary forms of government influence the lawmaking process, and we show how fundamental

[1] Remark attributed to Otto von Bismarck. According to Fred Shapiro of the Yale Law Library, the earliest attribution to Bismarck occurred in CLAUDIUS O. JOHNSON, GOVERNMENT IN THE UNITED STATES (1933). Shapiro's search of online newspaper archives points to a lawyer-poet named John Godfrey Saxe as the originator of the quip. Saxe is quoted in the DAILY CLEVELAND HERALD, Mar. 29, 1869 as saying: "Laws, like sausages, cease to inspire respect in proportion as we know how they are made." Saxe was the attorney general of Vermont, a two-time Democratic candidate for governor of New York, and eventually the editor of the NEW YORK EVENING JOURNAL. Fred Shapiro, *You Can Quote Them*, YALE ALUMNI MAGAZINE, July/August 2009.

[2] Hans Linde, *Due Process of Lawmaking*, 55 NEBRASKA LAW REV. 197, 255 (1975–6).

[3] *See also* SUSAN ROSE-ACKERMAN & PETER LINDSETH, EDS. COMPARATIVE ADMINISTRATIVE LAW (2010).

constitutional structures and values influence constitutional court review. In contrast, particularism stresses the deeply contingent nature of law and sees it as an outgrowth of the unique history of each society. Under that view, comparisons are touristic exercises that detail the exotic practices of strange places. We reject the strong form of that claim. History does matter, but it is not destiny. We also differ from those universalists who stress the intrinsic value of "the rule of law" or of human rights as expressed in the UN Universal Declaration of Human Rights, the European Convention on Human Rights, and similar texts.[4] We do not try to adjudicate debates over the meaning of the rule of law, and we do not seek to assess the proper content of rights or take a stand on which rights ought to be universally recognized. We take the differing contents of rights across our cases as given, and focus instead on democratic legitimacy.

We study the law of government policymaking – in the legislature, in the executive, and in the courts. Most constitutions contain little guidance on the substance of policy beyond the protection of rights. Rather, the legitimacy of the state to its citizens derives from the acceptability of its institutions and the procedures they follow. We show that in polities with basically democratic structures, there is room for a range of institutional choices, both in fact and in principle.

The closest cousin of our effort is the project on Global Administrative Law (GAL). That project began as a collaboration between a professor of American administrative law and two colleagues who specialized in international law; it has expanded to involve many scholars worldwide. Its protagonists have produced a casebook that frames the project.[5] At its core GAL studies international bodies with policymaking authority that are

[4] United Nations General Assembly, Universal Declaration of Human Rights, adopted December 10, 1948, http://www.un.org/en/documents/udhr/; Council of Europe, The European Convention on Human Rights (ECHR), adopted Rome, November 4, 1950 as amended, http://www.hri.org/docs/ECHR50.html. There is considerable overlap in the basic rights, but the UN Universal Declaration includes a number of substantive rights not included in the ECHR. The Universal Declaration is not directly enforceable. The ECHR is enforced by the European Court of Human Rights, although its remedies are limited and its caseload is overwhelming. For a strong statement on the priority of rights, *see* Ronald Dworkin, Taking Rights Seriously (1978).

[5] Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, **68** Law and Contemporary Problems 15 (2005); Benedict Kingsbury, *The Concept of "Law" in Global Administrative Law*, **20** European J. Int. Law 23 (2009). The GAL casebook is: S. Cassese, B. Carotti, L. Casini, E. Cavalieri, & E. MacDonald, eds., Global Administrative Law: The Casebook (3rd edition, 2012), available at: http://www.amazon.it/Global-Administrative-Law-Casebook-ebook/dp/B009JDN33U/ref=sr_1_3?ie=UTF8&qid=1349039229&sr=8-3

distinct from national polities. Many of them are free-standing administrations, not checked by legislatures, courts, or even quasi-constitutional texts. GAL's normative stance borrows the basic framework of the American rulemaking process with its focus on transparency, outside access, and reason-giving based on a rational connection between means and ends. We share GAL's interest in the public legitimacy of policymaking, but our focus is somewhat different. Like GAL, we study process; unlike GAL, we concentrate on well-developed polities responsible to a defined citizenry and containing legislatures and courts as well as administrative policymaking bodies. We seek both to provide a positive political economy argument for the cross-national differences we see and to argue for productive cross-country learning.

We hope to show that comparative public law is a two-way street. American law has lessons for the parliamentary systems in Germany and South Africa. Conversely, the parliamentary systems suggest potential reforms of the U.S. law of lawmaking. The European Union is special, but our other cases provide some lessons as the European Union struggles to balance the competing demands of the Parliament, the Council, the Commission, and of its Member States.

We argue that constitutional courts should review the democratic legitimacy of procedures *both* when they are deployed by the legislature in making laws *and* by the executive in making rules that have the force of law. But this is not an unproblematic enterprise. Courts that insist on "due process of lawmaking" must do so in ways that respect the underlying realities of each nation's constitutional structure and acknowledge the limited competence of the judiciary.

The basic empirical differences are clear and striking. Under the U.S. presidential system, the federal courts do not review internal legislative processes to check their democratic efficacy. Rather, legislative deliberations only enter the picture, if at all, as part of efforts to convince the *courts* that a statute has a valid substantive justification. In contrast, review of executive rulemaking is fundamentally concerned with the *public* accountability of rulemaking in agencies and cabinet departments.

The German Federal Constitutional Court is more likely than the U.S. Supreme Court to scrutinize the factual bases of statutes – an enterprise that can lead it to review the legislative process as well. The German Basic Law's list of constitutional rights covers many more substantive policy areas than does the U.S. document; hence, the German Constitutional Court can review the legislative reasoning behind a broader range of statutes than the U.S. Supreme Court. In contrast to the United States, however,

the German administrative courts provide almost no review of rulemaking procedures inside the executive or the regulatory agencies in ways that might enhance their public legitimacy. The applicable law is fragmented and leaves wide gaps. Judicial review focuses on the violation of rights in individual adjudications. The courts rarely check rulemaking procedures inside the executive.

South Africa has a still more expansive constitution that, according to recent judicial interpretations, includes a richer and broader idea of democracy than the representative conception contained in the German Basic Law. Legislatures must explicitly "facilitate public involvement" in their processes, and the South African Constitutional Court has struck down laws whose only defects are procedures that did not sufficiently involve the public. South Africa is closer to Germany when it comes to rulemaking. Although its constitution provides several grounds for reviewing administrative rulemaking processes, no legal instrument specifically provides for their review, and the South African Constitutional Court has yet to treat rules as analogous to statutes when it comes to process (although the issue is not yet settled).

EU courts are struggling to balance deference to other EU institutions with treaty values. The enactment of the Lisbon Treaty has introduced new distinctions that broaden the democratic basis of the European Union by emphasizing participatory values in addition to the core principle of representative democracy. It is not yet clear how the EU courts will interpret these broad statements of principle, but recent case law suggests that it will take a hands-off approach.

The differences, we argue, are tied to the different constitutional structures of our cases. A presidential system creates different incentives for legislators compared with a parliamentary system or with the European Union's complex framework. Hence, certain kinds of judicial review would be more intrusive in one system compared to another. However, the fundamental normative issues are comparable. Does the lawmaking process further public legitimacy? Can constitutional courts further this value without overstepping their bounds? Can checks and balances be compatible with the separation of powers? We hope to show, first, that U.S. courts' review of executive rulemaking embodies key democratic values applicable to our other cases. Second, we claim that the U.S. courts could follow the lead of South Africa and provide limited review of the legislative process in Congress that could enhance democratic legitimacy. This second possibility, however, contrasts sharply with the Supreme Court's recent case law that threatens to interfere with congressional processes in the name

of constitutional theories that are only narrowly accepted even within the Court itself. Those cases either fundamentally misunderstand the reality of lawmaking in a presidential system with a separation of powers, or else they are explicitly designed to hamper that process. In the German case, judicial requirements of "findings" are much less at odds with institutional reality, given that country's parliamentary structure.

Three principles frame our inquiry. The first is democracy. Can the state claim a mandate from the citizenry, and how does the constitution preserve and maintain that mandate? Do citizens participate in policymaking processes, and can they monitor the state in ways that go beyond the ballot box?[6] The second is the protection of rights. Which rights have constitutional status, and how do the courts enforce them? Third, states gain legitimacy by acting competently – incorporating relevant expert, technical knowledge into the development of policy. Unless their actions are an effective response to social and economic problems,[7] their claims to legitimacy ring hollow. Rights constrain democratic choice; but competence is required to implement democratic policies. Hence, the proper design of bureaucratic institutions is a central task of constitutional government. What role should the courts play in furthering this goal given the judges' own lack of technical training and management experience?

We concentrate on the way broad policies are made in modern democracies, not on their implementation in individual cases.[8] Thus, we do not

[6] Robert Dahl, Polyarchy, Participation and Opposition (1971) and Robert Dahl, Democracy and Its Critics (1989) are classic sources. His concept includes (1) elected officials, (2) free and fair elections, (3) inclusive suffrage, (4) the right to run for office, (5) freedom of expression, (6) alternative information sources, and (7) associational autonomy. Guillermo O'Donnell adds (8) elected officials and some high-level appointed officials should not be arbitrarily terminated before the end of their mandated terms, (9) elected officials should not be constrained by nonelected officials, especially the armed forces, and (10) there should be uncontested territory that defines the voting population (G. O'Donnell, *Horizontal Accountability in New Democracies* **9** J. of Democracy 1112 (1998).

[7] Giandominico Majone, *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance*, **2** European Union Politics 103–22 (2001); Giandominico Majone, *From the Positive to the Regulatory State*, **17** J. of Public Policy 139 (1997).

[8] The distinction between policymaking accountability and the legitimacy and accountability of individual decisions is made in Susan Rose-Ackerman, From Elections to Democracy: Building Accountable Government in Hungary and Poland, 5–7 (2005). *See also* Susan Rose-Ackerman, *Regulation and Public Law in Comparative Perspective*, **60** Univ. of Toronto Law J. 519 (2010). Some authors find a connection between the public acceptability of policy implementation on a case-by-case basis and overall government legitimacy. Thus, Bo Rothstein argues that governments are viewed as more legitimate if public benefits are broadly distributed. Needs testing places heavy demands on citizens and officials and can lead to suspicion of the state. Bo Rothstein, *Social Trust and Honesty in Government: A Causal Mechanism Approach*, in Creating

discuss the traditional due process or rule of law concerns that focus on the state's treatment of particular individuals.[9] We use the insights of positive political economy to explicate the role of courts in the review of policy-making procedures in the legislative and in the executive. We then consider our four cases and ask if existing legal patterns are sufficient to uphold democratic values in these polities with their rather different constitutional structures.

The three principles of legitimacy – democracy, rights, and competence – overlap and conflict in practice, and modern constitutions deal with the tensions in different ways. One route to legitimacy is through process, but the appropriate response is not always obvious. Procedures that further one type of legitimacy – say, individual rights – may limit others – for instance, democratic legitimacy or competence. The judiciary plays a role in policing these tensions and conflicts, and we study its role in monitoring and controlling legislative and administrative procedures. Our study puts the courts front and center as they confront the paradoxes of their role in reviewing how the rest of the state goes about its work.[10] As unelected bodies, how can they legitimately monitor other institutions that are more closely tied to the electorate and its elected representatives?

A key feature of judicial review is the link between the separation of powers and checks and balances. The separation of powers requires each branch to stay within certain boundaries to avoid interfering with the others. It counsels courts to show restraint, especially when dealing with politically sensitive issues. The doctrine of checks and balances holds that, in exercising its own particular powers, each branch should constrain the others' potential abuses. Some scholars stress that the separation of powers permits independent action by each branch; others see institutional separation

Social Trust in Post-Soviet Transition 13 (János Kornai, Bo Rothstein, & Susan Rose-Ackerman, eds., 2004). The connection that Rothstein posits may well be an important determinant of government legitimacy, but it is not our object of study. It might be necessary, but it can hardly be sufficient – for example, if the basic legal texts are themselves irrational and unconnected to citizen demands.

[9] We also do not study the law of torts, contracts, and property that provides a framework for private activity. The literature on due process and the rule of law that covers these senses of the term is vast. For an overview, which incorporates our topic as a subset, see Jeremy Waldron, *The Concept of the Rule of Law*, **43** Georgia Law Rev. 1 (2008–9). For a general overview in the context of fragile states, see Susan Rose-Ackerman, *Establishing the Rule of Law*, in When States Fail: Causes and Consequences (Robert Rotberg, ed., 2004).

[10] We leave to one side the role of higher-level courts in reviewing the procedures used by the courts themselves.

as a route to oversight without direct hierarchical supervision.[11] We will be exploring the complex ways courts check both the legislature and the executive in our cases.

Constitutional and statutory provisions frequently restrict the jurisdiction of the courts to cases involving the violation of rights. But other texts enable judges to impose procedural and structural constraints on both the executive and the legislature. These "process controls" can be quite aggressive and can merge with substance. For example, if the law requires the executive to give reasons before issuing a rule, is that a procedural requirement or a means for the courts to review substance? In all our case studies, courts exercise one or another kind of process control, but there are many differences in legal provisions. We will be exploring how interstate textual differences might be explained through a mixture of constitutional and democratic principles, on the one hand, and political self-interest, on the other.

Written texts only take us part way to an adequate understanding. Courts also play an independent role in defining their mandate in more or less aggressive fashion. Judges have different understandings of the restraints imposed by the separation of powers under their constitutions, and they also differ on the need to maintain the judiciary's reputation with the public and with the rest of government. They sometimes test the boundaries of their role through constitutional and statutory interpretations that challenge the political choices of the executive and the legislature.

To elaborate these tensions, we compare the U.S. presidential system with two parliamentary democracies, South Africa and Germany, and with the European Union. In each case, we place the judiciary in the broader constitutional and governmental structure of our case studies. We then ask some basic normative questions: Have the courts usefully contributed to the functioning of the political/policymaking system? Can the experience of one system contribute lessons to aid in the improvement of others? The

[11] *See, e.g.*, Torsten Persson, Gérard Roland, & Guido Tabellini, *Separation of Powers and Political Accountability* **112** QUARTERLY J. OF ECONOMICS 1163 (1997). *See* Bruce Ackerman, *The New Separation of Powers*, **113** HARVARD LAW REV. 633 (2000) for an overview of the debate and proposals for constitutional reform. In presidential systems chief executives have sometimes asserted that the separation of powers implies that the other branches cannot legitimately check their actions. *See, e.g.*, Susan Rose-Ackerman, Diane A. Desierto, & Natalia Volosin, *Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and the Philippines*, **29** BERKELEY J. OF INTERNATIONAL LAW 101 (2011), http://www.boalt.org/bjil/documents/Rose-Ackerman.pdf